

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 20, 2006

FLOYD E. RAYNER v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2000-A-589 Seth Norman, Judge

No. M2005-01672-CCA-R3-PC - Filed July 19, 2006

The petitioner, Floyd E. Rayner, was convicted by a jury in the Davidson County Criminal Court of five counts of rape of a child and five counts of aggravated sexual battery. The petitioner received a total effective sentence of fifty-one years incarceration in the Tennessee Department of Correction. Subsequently, the petitioner filed a petition for post-conviction relief, alleging that his trial counsel was ineffective. The post-conviction court denied the petition, and the petitioner appeals. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Mike J. Urquhart, Nashville, Tennessee, for the appellant, Floyd E. Rayner.

Paul G. Summers, Attorney General and Reporter; Brian Clay Johnson, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bernard McEvoy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The petitioner was convicted of multiple sexual offenses involving the abuse of his minor daughter over a span of years. The proof at trial revealed that the victim is mildly mentally retarded. When the offenses began, the victim was in fifth grade and was attending resource classes at school. State v. Floyd Earl Rayner, III, No. M2001-00971-CCA-R3-CD, 2002 WL 1336654, at *1 (Tenn. Crim. App. at Nashville, June 19, 2002). During part of that school year, the Rayner family lived

in a car. However, they later moved to a house on Louis Street in Nashville. That school year, the victim routinely went to school having neither clean clothes or a clean body. Her body was marked with sores, and she had lice. At the time the victim began seventh grade, the Rayner family had moved into the Music City Motor Inn. The victim began attending a different school. While her academic functioning improved slightly, the victim continued to attend school unwashed. The victim, in December 1999, reported to a family friend that she had been sexually abused. Id. During the ensuing investigation, the victim was removed from her parents' custody due to the filthy living conditions. The petitioner was later charged with the sexual abuse of the victim.

At trial, the victim testified that when the Rayners lived at the Louis Street address, the petitioner touched her "private parts" with his hands and mouth, on more than one occasion. Id. at *2. Additionally, she said that the petitioner penetrated her anus with his penis. Because the act hurt her, the victim asked the petitioner to stop. She also testified that the petitioner made her fondle his penis and perform oral sex.

The victim stated that after the family moved to the Music City Motor Inn, the petitioner again touched her private parts with his hands and mouth. Id. The petitioner also again anally penetrated the victim and forced her to fellate him.

At trial, medical proof was introduced to show that an examination of the victim did not reveal any anomalies to the victim's anal area; however, additional medical testimony explained that typically the anal area would not show signs of trauma after penetration. Id. Likewise, the victim's vaginal area did not conclusively reveal evidence of penetration. The examination of the victim revealed that she suffered from trichomonas, a sexually transmitted disease. There was evidence that the victim had been sexually fondled at school by a male student. Id. at *3.

The petitioner's testimony at trial was that he worked long hours to support his family and therefore his wife bore the burden of ensuring the cleanliness of their home and the victim. The petitioner denied engaging in any sexual activity with the victim. Id.

The petitioner was ultimately convicted of five counts of rape of a child and five counts of aggravated sexual battery. The trial court sentenced the petitioner to twenty-one years for each rape of a child conviction and nine years for each aggravated sexual battery conviction. The court ordered that two rape of a child sentences and one aggravated sexual battery sentence be served consecutively to each other; the remainder of the sentences were to be served concurrently for a total effective sentence of fifty-one years.

Subsequently, the petitioner filed a petition for post-conviction relief, alleging that his trial counsel was ineffective. Specifically, the petitioner complained that counsel failed to properly investigate his case, to call all pertinent witnesses, to follow up on a potential defense, to hire an investigator, and to properly perfect the appeal of his case.

At the post-conviction hearing, the petitioner's trial counsel testified that he was appointed in January or February 2000, and the case was tried in January 2001. In the year he worked on the case, trial counsel had numerous meetings with the petitioner. During those meetings, counsel reviewed with the petitioner the discovery documents, the State's evidence, and potential trial strategy. Counsel stated that he wanted to keep the petitioner informed.

Counsel recalled that the victim had some developmental problems. He did not request an individual competency evaluation of the victim because he did not believe it was warranted.

Counsel noted that he looked into a possible medical defense for the petitioner. He explained that the victim was diagnosed with trichomonas, a sexually transmitted disease. The petitioner voluntarily submitted to testing to determine if he was the source of the disease. The results came back negative for the presence of sexually transmitted diseases. Counsel thought the results were a "significant" piece of evidence. However, he later learned that the petitioner had not been tested specifically for trichomonas. By the time counsel learned this information, it was too late to conduct another test to determine if the petitioner could be the source of the victim's disease.

Counsel stated that he thoroughly researched trichomonas in preparation for trial. He read several articles and spoke with doctors. Counsel did not hire an expert on trichomonas. Counsel believed that the results of the petitioner's sexually transmitted disease tests were inconclusive and were "nothing to bring to trial"; however, "[i]t was approached during the trial through the State's witnesses about her having that and no comparison that [the petitioner] was carrying that same disease." Additionally, on cross-examination counsel pointed out that sexual contact was not the only way that the trichomonas could have been transmitted. Counsel recalled that the defense he pursued at trial was that the victim fabricated the abuse to get out of the petitioner's household.

Counsel asserted that he learned of witnesses through conversations with the petitioner and through discovery. He spoke with all of the witnesses he could locate. However, he was unable to recall several potential witnesses the petitioner alleges should have been called. Counsel stated that he did not recall the petitioner mentioning David Nealson or Leanne Ramsey as potential witnesses. He spoke with the petitioner's wife about being a witness, but she left the jurisdiction prior to trial. Additionally, counsel recalled that a security guard at the Music City Motor Inn was a potential witness, but he was unable to locate that witness. Counsel stated that "[a]nything that was in through discovery or [the petitioner] or his wife at the time that had any relevance to somebody other than [the petitioner] being the perpetrator was investigated."

Counsel acknowledged that he never hired an investigator. He explained, "A lot of what I was doing, I did on my own. But I didn't have enough to go forward with, as far as investigator, anywhere to lead them to that." Counsel stated that he went to the scene himself and investigated; however, he was unable to find "solid names, date of births or anything of the people we were looking for."

Counsel acknowledged that he represented the petitioner on appeal, raising issues of sufficiency and sentencing. Counsel stated that he thought the “entire record” went up on appeal, but he did not check out the record to ensure that it was complete. Counsel conceded that this court did not address the sentencing issue because the presentence report was not included in the appellate record.

The petitioner testified at the post-conviction hearing that he could recall only two meetings with counsel during the course of his representation. The petitioner admitted that counsel gave him copies of all discovery. The petitioner told counsel that when his family lived at “the Bottoms,” David Nealson lived beside them. When they moved to the Music City Motor Inn, Nealson followed them and moved in beside them. Additionally, Nealson worked with the petitioner at an Aztec convenience store. The petitioner told counsel to investigate Nealson as the perpetrator. He suspected Nealson because “I was told that he got my daughter walked in on him two or three times standing there naked.” The petitioner stated that he thought Nealson was in Austin, Texas, and he mentioned that Nealson had been on America’s Most Wanted for child pornography and sodomy.

The petitioner said that he told counsel to call Leanne Ramsey to testify on his behalf. Ramsey worked at the Aztec with him and Nealson. He thought that she would have “insight” into the case and would be able to testify that the victim was “spoiled.” The petitioner said that Ramsey would testify that the victim “would say things and do things if she didn’t get what she wanted.” The petitioner thought that Ramsey was testifying at his trial; however, “when it come time she wasn’t there.” He believed that counsel was going to ask for a recess or continuance to procure Ramsey’s presence, but counsel merely continued with the trial.

The petitioner testified that he was tested for sexually transmitted diseases. He thought that he had been tested for trichomonas “even though they say I wasn’t.” He said that he did not ask counsel to hire an expert on sexually transmitted diseases. Regardless, the petitioner “figured he would, you know, I was trusting him to do it.”

The petitioner stated that counsel handled his appeal. Counsel did not ask the petitioner what issues he wanted to appeal. The petitioner discovered that this court would not address his sentencing issue because counsel had failed to include the presentence report in the appellate record.

At the conclusion of the post-conviction hearing, the post-conviction court denied the petition for relief. The court found that the petitioner did not establish by clear and convincing evidence that counsel was ineffective. On appeal, the petitioner challenges this ruling.

II. Analysis

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the

evidence.’” State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court’s findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court’s findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court’s conclusions of law purely de novo. Id.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, “the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel’s performance was below “the range of competence demanded of attorneys in criminal cases.” Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover,

[b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).

On appeal, the petitioner argues that counsel was ineffective in failing to properly investigate the case, in failing to call Nealson and Ramsey as witnesses; in failing to pursue a potential defense regarding the petitioner not having trichomonas, a sexually transmitted disease that the victim had; in failing to hire an investigator; and in failing to perfect an appeal by not ensuring that the record on appeal was complete.

First, we will examine the petitioner’s complaints regarding counsel’s failure to properly investigate the case and his failure to call Nealson and Ramsey as witnesses. We note that the petitioner makes no definitive arguments as to what further investigation would have revealed. The

post-conviction court implicitly accredited counsel's testimony that he investigated all possible witnesses for trial and searched the scene for leads. We can find no reason to dispute the post-conviction court's finding. Additionally, although the petitioner complained about counsel's failure to call Nealson and Ramsey as witnesses at trial, he did not produce either witness to testify at his post-conviction hearing. Generally, "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We may not speculate on what benefit these witnesses might have offered to the petitioner's case, nor may we guess as to what evidence further investigation may have uncovered. Id. Accordingly, the petitioner has failed to demonstrate prejudice in this regard.

The petitioner's second complaint concerns counsel's failure to pursue a defense centering on the petitioner testing negatively for sexually transmitted diseases. The post-conviction court found that the jury was aware that the victim was suffering from trichomonas, but the petitioner was not. The court noted that counsel investigated the defense and determined that "it would not be a viable defense based on the fact that the petitioner could have been an active carrier at the time of the offense despite not being infected at the time he was tested." At the post-conviction hearing, counsel testified that because the petitioner had not been specifically tested for trichomonas, the petitioner was not exonerated as the perpetrator. Therefore, we cannot fault counsel for choosing a different tactic for defense. See State v. Hellard, 629 S.W.2d 4, 9 (Tenn. 1982). We conclude that the petitioner has failed to prove ineffective assistance as to these claims.

The petitioner next complains that counsel failed to hire an investigator. The petitioner's entire argument on this issue is as follows:

Trial [counsel's] failure to hire any form of investigator in this case directly reflected the outcome of the case These investigators would have been necessary to properly develop the witnesses and defenses in the case. Additionally these actions would have been necessary part of the trial to properly develop the evidence and the defense of the petitioner regarding the source of the sexually transmitted disease.

Counsel testified at the post-conviction hearing that he thoroughly researched trichomonas and determined that because of the time that had passed, further testing of the petitioner would not ascertain whether the petitioner was carrying the disease. Additionally, counsel stated that he visited the scene and interviewed or attempted to interview all known witnesses. The petitioner does not explain what further investigation performed by an investigator would have revealed. Therefore, he has not proven ineffective assistance of counsel in this regard.

Finally, the petitioner complains that counsel failed to include the presentence report with the appellate record, thus precluding this court from reviewing the petitioner's sentence on direct appeal. This is an issue that is of growing concern to this court. Our law is clear that the appealing

party bears the burden of ensuring that a fair, accurate, and complete record is before this court for review. See Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). However, too often issues come before this court that we are unable to review because of an inadequate record. This is a problem easily remedied by the parties reviewing the record that has been submitted on appeal. We conclude that counsel was deficient in this regard.

To be entitled to post-conviction relief, the petitioner must also prove that he was prejudiced by this error. The post-conviction court found that substantial evidence existed to support the sentences imposed in this case. We are unable to review this finding because the petitioner has failed to include a transcript of the trial and sentencing hearing with the record on appeal. See Juan Alfonzo Hill v. State, No. E2004-02915-CCA-R3-PC, 2005 WL 2276422, at *7 (Tenn. Crim. App. at Knoxville, Sept. 19, 2005). Moreover, the petitioner did not ask the post-conviction court or this court to take judicial notice of the direct appeal record. As the State pointed out in its appellate brief, “[p]ost-conviction counsel here has committed the same mistake that trial counsel committed on direct appeal – he did not include all parts of the record necessary for this Court to review sentencing.”

We note that regardless of the petitioner’s error, this court *may* take judicial notice of the direct appeal record. See State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964). However, we choose not to do so in this case because the petitioner failed to argue in either the lower court or this court how he was prejudiced by counsel’s failure to ensure the presentence report was included in the direct appeal record. Prejudice will not simply be presumed by this failure; it must be specifically alleged and proven. See John R. Black v. State, No. M2004-01785-CCA-R3-PC, 2005 WL 1930795, at *4 (Tenn. Crim. App. at Nashville, Aug. 11, 2005), perm. to appeal denied, (Tenn. 2005); Donald R. West v. State, No. 03C01-9407-CR-00253, 1995 WL 241548, at *4 (Tenn. Crim. App. at Knoxville, Apr. 26, 1995). It is not the job of this court to ferret out potential problems, thereby serving the function of both court and counsel. The petitioner is not entitled to relief on this issue.

III. Conclusion

Based upon the foregoing, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE